

**MINUTES  
of the  
FIFTH MEETING  
of the  
TOBACCO SETTLEMENT REVENUE OVERSIGHT COMMITTEE**

**November 2, 2015  
Room 321, State Capitol  
Santa Fe**

The fifth meeting of the Tobacco Settlement Revenue Oversight Committee (TSROC) was called to order by Representative John L. Zimmerman, co-chair, on November 2, 2015 at 9:25 a.m. in Room 321 of the State Capitol.

**Present**

Sen. Cisco McSorley, Co-Chair  
Rep. John L. Zimmerman, Co-Chair  
Rep. Gail Chasey  
Sen. John C. Ryan  
Sen. John Arthur Smith

**Absent**

Rep. Monica Youngblood

**Advisory Members**

Sen. Linda M. Lopez  
Rep. Jim R. Trujillo

Sen. Mary Kay Papen  
Rep. Patricio Ruiloba  
Rep. Don L. Tripp

**Staff**

Celia A. Ludi, Staff Attorney, Legislative Council Service (LCS)  
Douglas Carver, Staff Attorney, LCS  
Nancy Martinez, Intern, LCS

**Minutes Approval**

Because the committee will not meet again this year, the minutes for this meeting have not been officially approved by the committee.

**Guests**

The guest list is in the meeting file.

**Handouts**

Copies of handouts are in the meeting file.

## **Monday, November 2**

### **Welcome and Introductions**

Representative Zimmerman welcomed those in attendance and conducted introductions.

### **Tobacco Settlement Permanent Fund Asset Allocation**

Steve Moise, state investment officer, State Investment Council (SIC), and Vince Smith, deputy state investment officer, SIC, made a presentation to the committee on the investment performance and asset allocation of the Tobacco Settlement Permanent Fund, working through a PowerPoint presentation given to the committee. Mr. Moise noted that the fund has assets of \$205.1 million as of September 30, 2015, with investment returns for the year ending on that date of -0.91 percent, but a fund asset value growth of over \$13 million over the prior 12 months. In June 2015, \$19.3 million was distributed from the fund and \$35 million was received in 2015 payments. Mr. Moise also noted that this year was the first time the fund's corpus did not have 100 percent or more appropriated from annual legal settlement payments since fiscal year (FY) 2008. Mr. Moise discussed how the fund played a part in the state's reserve funds, and then he discussed the fund's FY 2014 investment returns and its three-, five- and 10-year performance. Mr. Moise then discussed the allocation of fund assets, with a projected annual rate of return of 6.5 percent, noting that allocating 63 percent of the total equity is an aggressive position. He then gave an overview of the tough last decade for investments on a national level and discussed the pros and cons of diversifying the portfolio and investing the fund in private market investments. Mr. Moise finished with a series of suggestions, including removing the reserve status of the fund; returning to a 50/50 division of annual settlement revenue payments; and creating a revenue stream to increase the size of the fund so that it could start growing.

Members of the committee discussed and asked questions concerning maintaining the solvency of the fund, the history of the fund and how the legislature might help with the recommendations that the SIC presented.

### **Update on Arbitration**

Ari Biernoff, assistant attorney general, Office of the Attorney General (AGO), gave the committee a brief update on the status of the arbitration concerning past payments made as part of the Master Settlement Agreement. He noted that the ruling concerning the adjustment in payment for 2003, based on a 2013 review of the 2003 payment, was still pending. In that case, the judge was being asked to modify an aspect of the review, and the AGO was asking the Master Settlement Agreement judge to vacate the 2013 ruling. In addition, Mr. Biernoff noted that the 2004 enforcement year arbitration had not started and that there was a widening gap between the present and past settlement payments still in dispute.

Members of the committee asked questions about and discussed the progress and history of the litigation, what was occurring in other states that were part of the Master Settlement Agreement and whether the legislature could do anything to speed the process.

## **Approval of Minutes**

Upon a motion by Representative Chasey, seconded by Senator McSorley, the minutes from the October meeting of TSROC were approved with no opposition.

## **Utilization of Tobacco Cessation Services Within the Medicaid Program**

Charles Canada, Human Services Department (HSD), read a statement that he provided to the committee concerning the utilization of tobacco cessation services within Medicaid. He noted the public-private collaboration among the HSD, the Department of Health (DOH) and the American Cancer Society Cancer Action Network. He noted the number of people enrolled in Medicaid who smoke, 37 percent nationally, and the economic impact tobacco use has on Medicaid. He then discussed the importance of tobacco cessation services, especially telephone counseling services known as "quitlines", and noted that the HSD will provide hard data to the committee before it meets again. A member of the committee, after noting that the committee would not be meeting again this year, asked the department to provide its data to staff and discussed what was happening in other states.

## **Update on Breast and Cervical Cancer Treatment Program**

There was not a formal presentation on this topic. Kim Carter, bureau chief, Centennial Care Bureau, Medical Assistance Division, HSD, and Beth Pinkerton, section head, Cancer Prevention and Control Section, DOH, discussed with the committee the data the committee would like to receive concerning the Medicaid Breast and Cervical Cancer Early Detection Program (Medicaid category 052).

## **Opportunities to Leverage Federal Medicaid Funds**

Brian Hoffmeister, program evaluator, Legislative Finance Committee (LFC), and Maria Griego, program evaluator, LFC, presented the executive summary of the LFC report, "Various State Agencies Opportunities to Leverage Federal Medicaid Funds, Report #15-10", dated October 27, 2015. They noted the changes to the health care landscape in the state as a result of the passage of the federal Patient Protection and Affordable Care Act (ACA), especially the fiscal challenges posed by the state assuming a growing portion of Medicaid costs due to the ACA Medicaid expansion. The LFC evaluation "analyzed 16 programs across seven state agencies for the potential to either replace state funds with Medicaid reimbursements or enhance or reallocate revenues that would be used to draw down additional Medicaid funds". The three main themes identified were: 1) "increasing Medicaid billings for current services that are Medicaid eligible but receive state or local funds"; 2) "expanding Medicaid-eligible services for certain programs"; and 3) "reallocating resources related to programs with diminished roles due to the ACA". The LFC recommended that the legislature look at statutory adjustments to eliminate service overlaps, that agencies prioritize working with Medicaid-eligible providers and that the legislature work with the HSD and managed care organizations to ensure that health care services supported out of the general fund be transitioned to Medicaid when that is appropriate. Mr. Hoffmeister and Ms. Griego then read through the details of the executive summary regarding the report's findings and recommendations.

Members of the committee discussed and asked questions concerning some of the specific recommendations and the amounts involved in the ACA Medicaid expansion.

### **3-D Mammography Funding Request Update**

Pamelya Herndon, executive director, Southwest Women's Law Center, gave a presentation on tomosynthesis as an important tool in battling breast cancer, working through a PowerPoint presentation handout given to the committee. She discussed the differences between 2-D mammography and 3-D mammography (breast tomosynthesis), and she emphasized that the use of 3-D mammography in conjunction with 2-D mammography increased detection rates over 40 percent and was particularly useful when the size of the cancer was less than one centimeter. She requested that the committee support funding of 3-D mammography for the poor, specifically by providing \$2.5 million for the purchase of a 3-D machine in a mobile van that could bring this screening to disadvantaged communities. She also requested \$500,000 for the doubling of the provision of 3-D mammography services.

Members of the committee discussed and asked questions concerning the availability of 3-D screening services, Medicaid reimbursement for those services, the availability of 2-D services to women in New Mexico, the link between tobacco use and breast cancer and the costs for providing 3-D screening versus 2-D screening.

### **Cigarette Tax Revenue Distributions and Bonding**

Zach Dillenback, chief lending officer, New Mexico Finance Authority, gave a presentation to the committee concerning cigarette tax revenue distributions and bonding, working through a handout presented to the committee. He showed the distribution of current cigarette tax revenue distributions, noting that the great majority of those — 74.9 percent — went to the general fund. He discussed the various cigarette tax revenue bonds authorized in the 2003 and 2005 legislative sessions, noting that they are secured by the 8.89 percent University of New Mexico (UNM) Health Sciences Center (HSC) cigarette tax revenue distribution and the 9.77 percent credit enhancement account (CEA) distribution. He discussed the refunding of certain bonds to take advantage of the current interest rate environment, and he went through spreadsheets detailing the UNM HSC and CEA distribution revenue. Mr. Dillenback then discussed the cigarette tax revenue bonds authorized in 2003 to improve various DOH facilities; these bonds are secured by the 3.74 percent DOH cigarette tax revenue distribution. Mr. Dillenback also went through a spreadsheet detailing the DOH distribution revenue. He then discussed the various bond issuances to improve cancer treatment in rural class B counties, noting that they were secured by the 0.62 percent rural county cancer treatment cigarette tax revenue distribution, and he went through a spreadsheet detailing the distribution revenue from that source. He concluded his presentation by discussing the series 2006 behavioral health cigarette tax bonds, used to capitalize the Behavioral Health Capital Fund, which was created to finance capital needs for small nonprofit providers in rural and underserved areas.

Members of the committee discussed and asked questions concerning some of the data presented by Mr. Dillenback and asked about some of the specific projects funded by the bonds.

### **E-Cigarettes: Latest Research on Health Effects**

Dr. Joel Nitzkin, senior fellow in tobacco policy, R Street Institute, gave the first part of the presentation on the latest research on the health effects of e-cigarettes, working through a PowerPoint presentation provided as a handout to the committee. Dr. Nitzkin, after commenting that the R Street Institute was a Libertarian think tank, noted that e-cigarettes were a game changer in tobacco policy. He pointed the committee to the 2014 findings and recommendations in a Food and Drug Law Institute research paper, provided to the committee, that showed that e-cigarettes were not recruiting nonsmoking teenagers to smoking, that e-cigarettes were a gateway away from smoking and that e-cigarettes are far safer than traditional cigarettes. The policy recommendations include support for an age limit on the use of e-cigarettes but no taxation on e-cigarettes or other restrictions on their use. Dr. Nitzkin noted that 2014 findings had been reaffirmed in new studies, which have shown, among other findings, that e-cigarettes are 95 percent safer than smoking. He further noted that the data from the Centers for Disease Control and Prevention (CDC) emphasized increased concern with teen use of e-cigarettes, but the data actually show that if e-cigarettes were a gateway to other tobacco use, usage of other types of tobacco would be rising instead of declining. He alerted the committee to data indicating that imposing restrictions on e-cigarettes has the effect of increasing teen smoking. Dr. Nitzkin also cited data showing that e-cigarettes do not have the environmental effects of traditional tobacco. Dr. Nitzkin claimed that the public health community, because of its commitment to a tobacco-free society, has a conflict of interest and is hostile to any tobacco-related companies. Dr. Nitzkin proposed that there be no new restrictions or taxes on e-cigarettes.

Dr. Richard Larson, executive vice chancellor and vice chancellor for research, UNM HSC, gave the second part of the presentation on the latest research on the health effects of e-cigarettes, as Dr. Matthew Campen, who was scheduled to present this research, was unable to attend the meeting. He noted that there are significant health issues with combustible forms of tobacco use and that in-between products have large unknowns. While e-cigarettes are not combustibles, they do contain nicotine, which is known to have long-term negative cardiovascular effects on people. In addition, the concern about particulate matter is not referring to particles found within traditional tobacco, but the unknown effects of the different compounds included in e-cigarettes. Dr. Larson stated that he would support age restrictions on e-cigarette use because of the effects of nicotine and because of the many unknowns surrounding the long-term health effects of e-cigarettes. Additionally, given these unknowns, Dr. Larson suggested that legislators err on the side of prudence. He noted that there are correlations between youth tobacco use and e-cigarette use and that there have been studies published, including one in the prior 30 days, that showed that e-cigarettes are a gateway mechanism for the use of traditional tobacco products. He also noted that increased taxation has been shown to decrease usage.

Members of the committee discussed and asked questions of the two presenters about regulations on e-cigarettes and tobacco products, nicotine as an addictive substance, the gateway effects of e-cigarettes, the organic compounds in e-cigarettes and competing scholarship on the health effects of e-cigarettes.

## Nicotine Taxation

Maggie Mahoney, executive director, Tobacco Control Legal Consortium at the Public Health Law Center, William Mitchell College of Law, St. Paul, Minnesota, gave the first part of the presentation on nicotine taxation, appearing via Skype and working through a PowerPoint presentation provided as a handout to the committee. She noted that increasing the price of tobacco products is the most important way to decrease tobacco consumption, but she added that under the federal Tobacco Control Act, the federal Food and Drug Administration may not levy taxes on tobacco products. State taxes on cigarettes range from a low of \$0.17 in Missouri to \$4.35 in New York, with New Mexico falling somewhere in the middle as the twenty-second highest in the nation. Ms. Mahoney also discussed taxation rates on combustible and noncombustible tobacco products. Ms. Mahoney then moved to a discussion of taxation of e-cigarettes, noting that three states plus the District of Columbia have some sort of tax on e-cigarettes, and Minnesota considers e-cigarettes taxable if the e-cigarette contains some form of nicotine derived from tobacco. There are also certain individual communities, such as Chicago, that tax e-cigarettes. She noted that updated CDC data show that there is no convincing evidence supporting a shift from traditional cigarettes to e-cigarettes, and the data suggest that e-cigarette use may lead to use of traditional cigarettes or cigars. She reminded the committee that when considering taxation, one must consider the varieties of e-cigarettes, which products should be taxed and whether the tax should be applied at the wholesale or retail level. She concluded by discussing the experience of creating a tax in Minnesota as an example of the policy choices with which legislators would have to wrestle.

Members of the committee asked Ms. Mahoney about the revenue raised from the tax in Minnesota.

Gregory Conley, president, American Vaping Association, gave the second part of the presentation on nicotine taxation. He opened his discussion by noting that "smokers smoke for the nicotine, but die from the tar". He directed the members of the committee to the packet of articles he presented to them, noting especially a *New England Journal of Medicine* article that encouraged smokers to switch to tobacco-free products, and noting other articles that showed the amounts states have saved when smokers in those states switched to tobacco-free products. He discussed the drop in use of traditional cigarettes and the rise in exclusive use of e-cigarettes, especially among youth. He stated that the consequences of taxing vaping products would be a negative impact on small businesses and the drop in the use of e-cigarettes, resulting in a switch back to traditional cigarettes. He concluded by saying that no tax or user fee for e-cigarettes is justified.

Christina Keyes, economist, LFC, gave the third part of the presentation on nicotine taxation, working through a PowerPoint presentation provided as a handout to the committee and focusing on Senate Bill 65, from the 2015 regular session, which was a bill designed to amend the Tobacco Products Tax Act to impose a tax on specific nicotine products and delivery devices and to require labeling of nicotine content on products. If it had been signed into law, the bill would have imposed both an excise tax on e-cigarettes and a tax on e-cigarette solutions at parity

with cigarettes. Ms. Keyes addressed the tremendous recent and projected growth of the e-cigarette industry in New Mexico and nationally. Ms. Keyes concluded by noting that the passage of the bill would have had a high administrative impact on the state and that the use of e-cigarettes has a high number of health unknowns.

Sandra Adondakis, New Mexico government relations director, American Cancer Society Cancer Action Network, gave the fourth part of the presentation on nicotine taxation, working through a PowerPoint presentation provided as a handout to the committee. She opened her presentation by discussing where New Mexico stood with the trifecta of preventing tobacco use. The state has a smoke-free law, she noted, but does not invest in tobacco use and prevention cessation programs at the CDC-recommended level of \$22.8 million, nor does the state have significant and equivalent tax rates for all tobacco products. The advantages of increasing user fees on tobacco, she added, are new revenue, a benefit to public health and cost savings in health care expenditures. A \$1.00 increase in the state cigarette tax would generate \$27.24 million in new revenue each year, and an equivalent tax on non-cigarette tobacco products would generate \$8.7 million in new revenue each year. All tobacco products and e-cigarettes should be taxed equally to protect children, as high prices help to keep young people from starting to use tobacco. Equivalent taxes on all products would also help current users of tobacco to quit. Ms. Adondakis then detailed some of the costs to the state from cigarette smoking and how an increased cigarette tax would save health care costs for the state by reducing the number of smoking-related diseases and other illnesses, as well as reducing other adverse health effects. She discussed the trends for the use of tobacco products in the state, noting the decrease in cigarette use, that spit and chew tobacco use had leveled and that cigar and hookah use has increased. She added that e-cigarette use has likely increased as well, presuming New Mexico is following national trends. She concluded by noting the ways that tobacco product taxes, by reducing the number of smokers, would save a significant number of lives in the state.

Members of the committee asked Ms. Adondakis about sales of tobacco products on tribal lands and on military bases, the history of tobacco taxes in the state and usage rates among the state's youth.

Dr. Larson gave the final part of the presentation on nicotine taxation, working through a PowerPoint presentation provided as a handout to the committee, with a focus on bioscience development in New Mexico. He discussed the economic challenges facing the economy and the importance of investment in research and development. He then gave an overview of the significant positive economic impact that the bioscience sector has had across the nation. He discussed the core economic model of bioscience — that inventions lead to innovations, which bring about investment by technology-based companies, which spills over into broader economic impact. The key to making this model successful is effective public-private partnerships, especially those pairing universities with the private sector. Dr. Larson gave an overview of the process for commercialization of bioscience research and successful public-private partnerships, and he gave background on bioscience as a field and of bioscience as an industry in New Mexico. Other states, he noted, have given bioscience-specific incentives, which seem to have a greater

impact on developing the industry versus more general incentives. These specific incentives include research innovation pools, recruitment, financing, grants, tax credits, bio-ready communities, biomedical research bonds and the development of a state biocenter. He concluded by noting that a \$1.00 cigarette tax leads to approximately \$2 million in revenue to the UNM HSC, funding that helps to bridge the development gap that often exists between innovations and investment by technology-based companies. Dr. Larson added that cigarette taxes not already targeted to the UNM HSC could also be invested in bioscience, but that would require a public-private collaborative.

Members of the committee asked questions about and discussed with Dr. Larson various aspects of the bioscience industry, its economic impact and its potential for economic development in the state.

### **Public Comment**

Jennifer Van Velkingburgh, a volunteer with the American Cancer Society Cancer Action Network, encouraged the committee to consider supporting a strong indoor clean air law, funding tobacco cessation programs at CDC-recommended levels and imposing a more significant tobacco tax.

Heather Marcellus, a disabled veteran with posttraumatic stress disorder, told the committee that she uses e-cigarettes, that many disabled veterans had businesses selling e-cigarette products and that a tax on e-cigarettes could put businesses owned by disabled veterans out of business.

Gerald Chacon noted that he started smoking e-cigarettes about a year before as he wanted to live to see his grandchildren and that e-cigarettes have worked to get him off using traditional cigarettes and have helped him to live a healthier lifestyle.

Tim Hurst, with T&S Vapors, noted that both he and his wife were finally able to quit smoking tobacco with the use of e-cigarettes, that they have opened an e-vapor store that employs 14 people and that they have thousands of customers who have come in to thank them, because e-cigarettes have allowed them to quit using tobacco. He urged that the state embrace e-cigarettes.

Melissa stated that she owns a vape store in Albuquerque, that an e-cigarette tax would cause her to close her doors and that the money would move to another state.

Daniel Montañño stated that he owns a vape store in Santa Fe, that e-cigarettes helped him to quit using cigarettes and that, while he is in the process of opening a second location in Santa Fe, he is looking out-of-state for his plans to open an e-liquid manufacturing business due to the possibility of a tax in the state. Many of his customers speak to him of the benefits of e-cigarettes.



Mat Hollingshead said that he is a store owner in Taos and that he wished he had a journal of all of the stories his customers told about kicking their habits. He said a tax would hurt his business.

Freddie Olson, a database developer and small business owner, said that he was not able to stop smoking until he used e-cigarettes and his e-cigarette shop in Albuquerque employs six people. His product is anti-tobacco, and to tax it further as a deterrent would go against a growing body of evidence of the benefits of e-cigarettes. He is in favor of no tax whatsoever, and he favors placing e-cigarettes into a new category outside of tobacco.

### **Adjournment**

There being no further business before the committee, the final meeting of the TSROC for the 2015 interim adjourned at 4:50 p.m.